IN THE

Supreme Court of the United States

No. 75-1598

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MEBA, AFL-CIO,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERVENOR IN OPPOSITION

RICHARD H. MARKOWITZ
JOEL C. GLANSTEIN
50 Broadway, Room 3100
New York, New York 10004
Counsel for Intervenor

GROSBY-LODER PRESS, INC., 95 Morton St., New York, N. Y. 10014 BE 3-2336
(76-618—51559)

INDEX

TABLE OF AUTHORITIES

Cases:

IN THE

Supreme Court of the United States

No. .....

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MEBA, AFL-CIO,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERVENOR IN OPPOSITION

Opinions Below

The Opinion of the Court of Appeals for the 9th Circuit is reported at 528 F. 2d 92 (9th Cir. 1975). The Decision and Order of the National Labor Relations Board which adopted the Findings of Fact and Conclusions of Law of the Administrative Law Judge and adopted that Judge's Recommended Order is reported at 214 NLRB No. 40 (1974).

Jurisdiction

The jurisdiction of the National Labor Relations Board in this matter was invoked under 29 U. S. C. Section 160. The jurisdiction of the Court of Appeals was properly invoked under 29 U. S. C. Section 160(f). The jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the 9th Circuit was invoked under 28 U. S. C. Section 1254(1).

Questions Presented

I.

Whether there is substantial evidence on the record as a whole to support the finding of the National Labor Relations Board, as affirmed by the Court of Appeals, that the ten (10) licensed marine engineers who were discriminatorily discharged by Petitioner are "employees" within the meaning of the National Labor Relations Act, as amended.

II.

Whether the National Labor Relations Board abused its wide discretion in finding as an appropriate unit, a unit comprised of all Assistant Engineers and oilers employed by the Petitioner on the Hughes Glomar Explorer. The Court of Appeals found no abuse of discretion.

III.

Whether the National Labor Relations Board properly found, as affirmed by the Court of Appeals, that the Union authorization cards signed by the Assistant Engineers were not invalid because of alleged supervisory solicitation.

IN THE

Supreme Court of the United States

No. .....

GLOBAL MARINE DEVELOPMENT OF CALIFORNIA, INC.,

Petitioner,

—v.—

NATIONAL LABOR RELATIONS BOARD,

Respondent,

—and—

DISTRICT NO. 1—PACIFIC COAST DISTRICT, MEBA, AFL-CIO,

Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR INTERVENOR IN OPPOSITION

Opinions Below

The Opinion of the Court of Appeals for the 9th Circuit is reported at 528 F. 2d 92 (9th Cir. 1975). The Decision and Order of the National Labor Relations Board which adopted the Findings of Fact and Conclusions of Law of the Administrative Law Judge and adopted that Judge's Recommended Order is reported at 214 NLRB No. 40 (1974).

Jurisdiction

The jurisdiction of the National Labor Relations Board in this matter was invoked under 29 U. S. C. Section 160. The jurisdiction of the Court of Appeals was properly invoked under 29 U. S. C. Section 160(f). The jurisdiction of this Court to review the Judgment of the United States Court of Appeals for the 9th Circuit was invoked under 28 U. S. C. Section 1254(1).

Questions Presented

I.

Whether there is substantial evidence on the record as a whole to support the finding of the National Labor Relations Board, as affirmed by the Court of Appeals, that the ten (10) licensed marine engineers who were discriminatorily discharged by Petitioner are "employees" within the meaning of the National Labor Relations Act, as amended.

II.

Whether the National Labor Relations Board abused its wide discretion in finding as an appropriate unit, a unit comprised of all Assistant Engineers and oilers employed by the Petitioner on the Hughes Glomar Explorer. The Court of Appeals found no abuse of discretion.

III.

Whether the National Labor Relations Board properly found, as affirmed by the Court of Appeals, that the Union authorization cards signed by the Assistant Engineers were not invalid because of alleged supervisory solicitation.

IV.

Whether the National Labor Relations Board or the Court of Appeals denied the Petitioner its rights to due process under the Constitution of the United States, the National Labor Relations Board Rules and Regulations and provisions of the Administrative Procedure Act, 5 U.S.C. Section 551, *et seq.*, by relying on the record developed before the Administrative Law Judge in the face of Petitioner's considered decision not to produce witnesses of its own because of alleged national security considerations necessitating secrecy restraints at the time of trial.

Federal Statutes Involved

The relevant federal statutes involved are the provisions of the National Labor Relations Act, as amended, 29 U. S. C. Section 151, *et seq.*

Statement of the Case

A. *Nature of the Case*

This case is before the Court as the result of the filing by Petitioner, Global Marine Development of California, Inc. (hereinafter "Global"), of a Petition for a Writ of Certiorari to the United States Court of Appeals for the 9th Circuit pursuant to 28 U. S. C. Section 1254(1). The Petition for a Writ of Certiorari seeks review by this Court of an Order of the United States Court of Appeals for the 9th Circuit which adopted the Order of the National Labor Relations Board reported at 214 NLRB No. 40 (Appendix A-1 through A-30) following the issuance of its Opinion on December 5, 1975 (Appendix B-1 through B-5).

B. *The Facts*

Global operates the Hughes Glomar Explorer, a unique vessel designed for deep-sea mining. The crew arrangement is also somewhat distinctive. The ship has two complete crews of 100 to 200 men that alternate operating the ship and the equipment on it, one crew being on board while the other is on leave. Each of the crews included an engine department consisting of a chief engineer, a first assistant engineer, a second assistant engineer and three third assistant engineers. All six of these men were licensed officers. Also included in each engine department were three oilers, who were unlicensed seamen.

Each assistant engineer worked a twelve-hour shift each day. His first six hours were spent in the engine control room on watch, monitoring engine room operations. Coast Guard regulations require that a licensed engineer be on watch at all times. During this time the oiler assigned to him made rounds of the engine room, also monitoring various devices. The engineer and oiler spent the last six hours of their shift on maintenance, making various repairs and improvements. Thus, four teams of one engineer and one oiler were needed to man the ship; because each crew had only three oilers, the less experienced third assistant engineers were, at times, assigned to oiler shifts.

On its maiden voyage in 1973, the Explorer was manned by the "A" crew from the shipyard in Chester, Pennsylvania, to Bermuda. There the "B" crew replaced the "A" crew and operated the ship around Cape Horn to Long Beach. Either during the time that the ship was in the shipyard or during the trip to Bermuda, all twelve of the licensed engineers signed authorization cards for the

Marine Engineers Beneficial Association (Union). Thereafter, Global's anti-union activity included promises of added benefits and threats of termination. While the Explorer was still at sea with the "B" crew, engineers from the "A" crew were summoned to Global's offices in Los Angeles and given the choice of giving up the Union or being terminated. The day the Explorer arrived in Long Beach, the "B" engineers were also given the same option. All the engineers opted to continue their Union affiliation and they were all summarily discharged.

Unfair labor practice charges were filed against Global by the Union, alleging that Global interfered with, coerced and eventually terminated the twelve men because of their union activities, in violation of section 8(a)(1) and (3) of the National Labor Relations Act, 29 U.S.C. §158(a)(1), (3). After a full hearing, the Administrative Law Judge found that Global had committed the alleged unfair practices and that a bargaining unit consisting of engineers and oilers was appropriate. His recommended order required Global to cease and desist from such practices, to offer reinstatement to ten of the discharged engineers and, upon request, to bargain with the Union. The Board adopted the Administrative Law Judge's findings and order. 214 NLRB No. 40 (Oct. 22, 1974). The Court of Appeals granted enforcement of the Board's Order.

In its Petition for Certiorari Global has contended that the Court of Appeals and the National Labor Relations Board erred by finding that the marine engineers employed by Global were "employees" rather than "supervisors" within the meaning of 29 U.S.C. Section 152(11) (Petition pp. 13 through 21); even if the engineer officers were not supervisory they were professional employees who should

not have been included in a bargaining unit employed by Global (Petition pp. 22-23); that any possible Union majority resulted from illegal supervisory, coercion and interference (Petition pp. 23-25); and that Petitioner was denied its Constitutional and statutory rights to a fair judicial and administrative review. (Petition pp. 25-27.)

All but the last of these contentions have been rejected by the Administrative Law Judge who presided at the trial of the unfair labor practice complaint issued in this matter, as well as by the National Labor Relations Board and the United States Court of Appeals for the 9th Circuit.

As to the last contention which has now been raised for the first time by the Petitioner in the Writ of Certiorari, the Petitioner makes no attempt to delineate the manner in which it would have developed the record differently had it been able to adduce evidence on its own; assuming there was evidence of this nature to be adduced.

ARGUMENT

I.

The decision below is clearly correct.

The issues that the Petitioner seeks to pursue for consideration and possible review by this Court are of the type which have traditionally been resolved by triers of fact rather than appellate courts and certainly not by this Court.

No amount of elaborate argument can convert these issues from their normal resting place in adjudication be-

fore an administrative trial and appellate body, rather than in an appellate court, and certainly not in the Supreme Court of the United States.

With respect to the finding of non-supervisory status of the marine engineers involved herein, the Court of Appeals correctly recognized that the findings of the Board on this question could only be overturned if they were not supported by substantial evidence from the record as a whole. *Universal Camera Corp.* v. *NLRB,* 340 U.S. 474, 487 (1951).

The Court of Appeals emphasized that the existence of the supervisory powers in 29 U.S.C. Section 152 (11) and not their exercise was determinative of one's status as a supervisor. (Appendix B-3). In upholding the Board's findings on the question of supervisory status of the marine engineers in Global, the Court of Appeals found that the Board's findings on this issue were supported by substantial evidence on the record. (Appendix B-4).

This Court has cited with approval the decision of the United States Court of Appeals for the 5th Circuit in *NLRB* v. *Swift and Co.,* 292 F. 2d 561, 563 (5th Cir. 1961) which emphasized that the determination of supervisory status with respect to the gradations of authority responsibly to direct the work of others are so infinite and subtle that a large measure of informed discretion is involved in the exercise by the Board of its primary function to determine those who as a practical matter fall within the statutory definition of a supervisor. *MEBA* v. *Interlake Steamship Co.,* 370 U.S. 173, 179, fn. 6 (1962).

In this case the Board has amply fulfilled its function and properly exercised its discretion in finding that the

marine engineers involved herein are "employees" rather than "supervisors" within the meaning of the National Labor Relations Act 29 U.S.C. Section 152 (3) and 29 U.S.C. Section 152 (11).

A similar result must obtain with regard to the unit determination of the Board, as approved by the 9th Circuit. The unit deemed an appropriate unit includes engineer officers in a bargaining unit with oilers. The Court of Appeals noted in this regard that:

> "The determination of whether there is a sufficient community of interests between engineers and oilers to justify a collective bargaining unit based on two groups is a matter left to the discretion of the board." *Packard Motor Car Corp.* v. *NLRB,* 330 U.S. 485, 491 (1947). (Appendix B-5).

The Court of Appeals found that the record below amply supported the Board's finding of the appropriateness of the Board's bargaining unit. In *South Prairie Construction Co. Local 627, International Union of Operating Engineers, ALF-CIO, et al.,* —— U.S. ——, 92 LRRM 2507, 2508, 2509 (1976) this Court has recently reiterated that:

> ". . . the selection of an appropriate bargaining unit lies largely within the discretion of the Board, whose decision, 'if not final, is rarely to be disturbed.' *Packard Motor Co.* v. *NLRB,* 330 U.S. 485, 491."

The Petitioner has advanced no valid ground which would warrant a reexamination by this Court of the appropriateness of the unit as determined by the NLRB in this matter.

The same deference that should be given to the National Labor Relations Board finding on the questions of unit and

supervisory status should also be accorded to the Board's determination on the question of alleged supervisory coercion of the Union authorization cards. As the Court of Appeals noted (Appendix B-4, B-5) the record supports the Board's conclusion that the Chief Engineers' activities did not involve supervisory solicitation. In order for solicitation to invalidate a Union selection process such solicitation must:

> "contain the seeds of potential reprisal, punishment or intimidation (or) the involvement of the supervisors does not rise to the level of supervisory solicitation. *NLRB* v. *WKRG-TB Inc.,* 420 F.2d 1302, 1316 (5th Cir. 1973)." (Appendix B-5)

Congress has mandated that:

> ". . . the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive." 29 U.S.C. Section 160(f).

There is ample substantial evidence on the record considered as a whole which should preclude further consideration of this matter by this Court. (Appendix B-5).

Finally, the Petitioner argues for the first time in its Petition to this Court that it was denied its constitutional and statutory rights to a fair judicial and administrative review because of the alleged refusal of the National Labor Relations Board and the Court of Appeals to give consideration to cross-examination testimony in the face of an admitted failure by the Petitioner to rest its case without producing a witness in its own behalf. (Petition, pgs. 25 and 26.)

Such contentions completely belie the actual facts in several respects. First, there is no indication whatsoever that the Court of Appeals did other than review the record as a whole in affirming and enforcing the National Labor Relations Board in this matter. (Appendix B-1 through B-5). Secondly, it must be emphasized that the Administrative Law Judge and the Board itself clearly based their findings of fact, conclusions of law and order "upon the entire record in the case, . . ." including cross-examination testimony. (Appendix A-5; A-1; A-2) Thus, Petitioner's contention in this regard is without merit.

Petitioner would also have this Court disregard its long standing policy of declining to consider issues raised by the way of Petitions for Certiorari which were not raised in the Court of Appeals or before the Board when such issues could have been raised. *Lawn* v. *U.S.*, 339 U.S. 362, n.16 (1958); *Neely* v. *Martin K. Eby Construction Company*, 386 U.S. 317, 330 (1967).

Finally, Petitioner glosses over the fact that the true nature of its security regulated mission was disclosed prior to initiation of enforcement proceedings in the U.S. Court of Appeals for the Ninth Circuit. Thus, while Petitioner had ample time to advance its claim of denial of due process or request remand in the Ninth Circuit, Petitioner failed to do so. See Newsweek, March 31, 1975, pp. 24-32; The New York Times, April 27, 1975, p. 43; Appendix B-1 through B-5.

Petitioner has simply not shown in what respect, if any, its witnesses would have adduced evidence contrary to that in the record which supported the findings, conclusions and order of the Administrative Law Judge, the National Labor Relations Board and the United States Court of Appeals

for the Ninth Circuit. Petitioner has simply not demonstrated the denial of due process it alleges, nor has Petitioner shown the need for a remand which it has untimely raised at this juncture.

For the reasons set forth above, the decision of the Administrative Law Judge, as affirmed by the National Labor Relations Board and further affirmed and enforced by the United States Court of Appeals for the Ninth Circuit should be deemed correct and in need of no further consideration by this Court.

II.

There is no conflict of decision.

Petitioner has advanced no contention that there is a conflict in decisions between any United States Court of Appeals or the administrative agency involved and a Court of Appeals or any United States District Court on the issues involved herein.

Therefore, there is no basis for granting the Petition for Certiorari since there is no conflict of decisions on any of the issues raised herein.

III.

There is no important question of Federal law.

Petitioner urges that even in the absence of an incorrect decision below, as well as the absence of a lack of conflict of decisions on the issues raised herein in the Circuits, there is an important question of Federal law which this Court should settle. That question purportedly involves the claim of a need for proper balance between federal

maritime law and policy on the one hand and federal labor law and policy on the other hand. (Petition, pg. 12.) Petitioner relies for this contention on *Southern Steamship Co.* v. *NLRB,* 316 U.S. 31 (1942); *Reese* v. *U.S.,* 95 F. 2d 784 (5th Cir. 1938); *Peninsula and Occidental Steamship Co.* v. *NLRB,* 98 F. 2d 411 (5th Cir. 1938). These cases involve the obligation, under federal maritime law, of employees to obey the authority of the vessel's Captain and the consequences to vessel employees from failure to obey. For example, in *Southern Steamship Co.* v. *NLRB, et al., supra,* this Court emphasized the importance of the relationship of the Master to seamen noting that "everyone and everything depend on him; he must command and the crew must obey." The Master or Captain on the vessel operated by Global was stipulated to be a supervisor; neither the Petitioner, the National Labor Relations Board, nor this Intervenor contend to the contrary. (Petition, p. 6.)

In suggesting that the assistant marine engineers, formerly employed by Global, found to be employees within the meaning of the National Labor Relations Act were supervisors by virtue of their licenses, the Petitioner has ignored the teachings of the Board in this sensitive factual area. In *Graham Transportation Co.,* 124 NLRB 960 (1959) the Board emphasized:

> "The fact that a marine engineer possesses a Coast Guard license does not alone support a finding of supervisory status."

Accord *Great Lakes Towing Co.,* 168 NLRB 695 (1967); *Material Services Division, General Dynamics Corp.,* 144 NLRB 908 (1963).

In attempting to demonstrate that there exists an important question of Federal law, Petitioner's contention must fail since there is no conflict between the need to obey the lawful commands of the Master and the factual finding of authority to give responsible direction by the National Labor Relations Board. The Intervenor's analysis, *supra,* pp. 7, 8, demonstrates that there is substantial evidence on the record as a whole to support the findings of the Board and the Court of Appeals that the assistant marine engineers employed on Global's vessel were "employees" not "supervisors" within the meaning of the Act.

Petitioner's attempt to suggest an important question of Federal law ignores this Court's willingness to defer to the discretion of the Board in making findings on the existence and non-existence of the supervisory status of licensed marine engineers in the face of existing federal maritime law requirements. *MEBA* v. *Interlake Steamship Co., supra.*

There is simply no important question of federal law which arises by virtue of this case which the Court must consider. What exists is a factual finding of the National Labor Relations Board that the assistant marine engineers on the Global vessel, Huges Glomar Explorer, were on the evidence in the entire record demonstrated to be "employees" rather than "supervisors".

The employment relationship and authority of these individuals can differ from other employment relationships and authority involving marine engineers on other vessels. Compare *Globe Steamship Company, et al.,* 85 NLRB 475 (1949) with *Graham Transportation Corp., supra; Great Lakes Towing Co., supra; Material Services Division, General Dynamics Corp., supra; A.L. Mechling Barge Lines,* 192 NLRB 1118 (1971).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that this Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

RICHARD H. MARKOWITZ
JOEL C. GLANSTEIN